RECORD AND BRIEFS

FILED
AUG - 3 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 16-1436 and 16-1540

In the
Supreme Court of the United States

DONALD J. TRUMP, *ET AL.*,
PETITIONERS
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *ET AL.*,
RESPONDENTS

DONALD J. TRUMP, *ET AL.*,
PETITIONERS
v.
STATE OF HAWAII, *ET AL.*,
RESPONDENTS

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURTS OF APPEALS
FOR THE FOURTH AND NINTH CIRCUITS

Brief of the Public Policy Legal Institute and Center for Competitive Politics As *Amici Curiae* In Support of Neither Party

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QUESTIONS PRESENTED

The Questions Presented in No. 16-1436 include "[w]hether Section 2(c)'s [of Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017)] temporary suspension of entry violates the Establishment Clause." Pet. I.

The Fourth Circuit Court of Appeals below rested its decision, in substantial part, on statements made by Donald Trump while he was a candidate for president. The majority opinion acknowledged that such review of campaign statements might "chill[] campaign promises," but thought such chill "a welcome restraint" on certain speech. *Int'l Refugee Assistance Project, et al. v. Trump, et al.*, 857 F.3d 554, 600 (4th Cir. 2017), slip op. 68, Pet. App. 62a.

Amici believe that, fairly included within Petitioners' Question 2 in Case No. 16-1436, is the question of whether a court's determinative reliance on candidates' campaign statements poses an unacceptable risk to First Amendment interests.

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STATEMENT OF INTEREST

Amicus curiae Public Policy Legal Institute is a nonprofit educational organization dedicated to protecting the right of Americans to advocate for and against public policies.[1] www.publicpolicylegal.com.

Amicus curiae Center for Competitive Politics is a nonpartisan, nonprofit organization that defends the First Amendment rights of speech, assembly, and petition through litigation, research, and education. www.campaignfreedom.org.

Amici take no position on the propriety of the underlying immigration order in these cases, nor on the Establishment Clause questions addressed below. They write separately to address a portion of the Fourth Circuit's opinion, discussed at pages 28-30 of the Petition in No. 16-1436, that welcomes the chilling of "campaign promises to condemn and exclude entire religious groups." This new "welcome restraint" doctrine – which could be used by other courts to probe candidates' campaign speech and associations in a broad range of cases – presents a significant danger to free speech and association.

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[1] Pursuant to Rule 37.3(a), *amici* certify that Petitioners have filed a blanket consent with the Clerk, and counsel of record for all Respondents have consented to the filing of this brief. Copies of the consents have been filed with the Clerk.

Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part, and no such counsel, party or person other than the *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

By undertaking a novel review of campaign speech in an Establishment Clause challenge, the Fourth Circuit majority below created a free speech dilemma. It then compounded that dilemma by "welcom[ing]" the "restraint" its analysis might impose.

A judicial review of campaign speech – even speech that sheds light on the reasons for later official action – chills expression and conflicts with numerous long-standing protections for campaign speech. As this Court recently reiterated: "the First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.'"[2]

A religious facet to campaign speech does not lessen its protection under the First Amendment. In the realms of religion and political belief, "exaggeration, ... vilification" and "false statement" are predictable.[3] "But the people of this nation have ordained, in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."[4] Importantly, if a candidate's speech on religious topics is "restrain[ed]" by the Fourth Circuit's opinion, the public will not know if a

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[2] *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1441 (2014) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

[3] *N. Y. Times v. Sullivan*, 376 U.S. 254, 271 (1964) (citation and quotation marks omitted).

[4] *Id.*

candidate holds such views, and will be unable to act on that knowledge in choosing how to vote.

This Court has never given the lower courts direction on how to review campaign speech in an Establishment Clause challenge. Nor have the lower courts, including those cited by the majority below, ever relied on campaign statements to find an Establishment Clause purpose in a facially-neutral official action. But this Court has not suggested that the judicial branch may, in that context, act to discourage particular electoral messages. And in similar areas, such as false statements by elected officials, this Court has rejected a "free-floating test for First Amendment coverage ... [based on] an ad hoc balancing of relative social costs and benefits."[5]

The Fourth Circuit majority below defended its reliance on campaign speech by claiming "highly unique" circumstances, 857 F.3d at 599, Pet. App. 61a, but divisive campaign speech is fairly common. Even in tiny local government units, under the Fourth Circuit's analysis, candidates may make divisive statements that would generate legal challenges to their later official actions. Litigants will likely rely on those statements, including when making discovery demands, and the Fourth Circuit has provided no effective limiting principle that would protect candidates and ensure the electorate's right to hear unvarnished campaign statements.

The Fourth Circuit majority's reliance on campaign speech could lead to numerous difficult and divergent decisions before future courts. And it was unnecessary: as the Ninth Circuit panel decision

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[5] *United States v. Stevens*, 559 U.S. 460, 470 (2010).

demonstrates, this case could have been decided without considering campaign speech.

Regardless of this Court's disposition of the merits in this case, and even if this litigation is mooted by events, the Court should take this opportunity to reject the Fourth Circuit's analysis and strongly endorse robust protections for speech about elections and political campaigns.

ARGUMENT

> To the extent that our review chills campaign promises to condemn and exclude entire religious groups, we think that a **welcome restraint**.

Int'l Refugee Assistance Project, et al. v. Trump, et al., 857 F.3d 554, 600 (4th Cir. 2017) ("*IRAP*"), Pet. App. 62a (emphasis added).[6]

This case comes to this Court as, *inter alia*, an Establishment Clause challenge to an executive order. But in reviewing that challenge, the Fourth Circuit unnecessarily relied upon a parsing of campaign speech, and suggested that any chill resulting from that approach would be a "welcome restraint" on certain messages. *Id.*

However distasteful a particular campaign statement may be, the "restraint" the Fourth Circuit majority below would "welcome" is self-censorship.[7]

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[6] All references in this brief to the Petition Appendix are to the Appendix filed in No. 16-1436.

[7] *Speiser v. Randall*, 357 U.S. 513, 526 (1958) ("the possibility of mistaken factfinding – inherent in all litigation – will create the danger that legitimate utterance will be

An endorsement of self-censorship conflicts with settled law protecting a variety of speech and speakers, was not necessary to the resolution of this case, and is applicable to many more situations than the Fourth Circuit's "highly unique" prediction would suggest.

Within the second Question Presented in Case No. 16-1436[8] is the substantive question of whether Section 2(c) of the Executive Order[9] may be subjected to Establishment Clause scrutiny based upon campaign "promises" by candidate Donald Trump, or whether the constitutionality of that order should instead rise or fall based upon evidence less likely to chill political speech and association. *See, e.g.*, Pet. 28-30; *IRAP*, 857 F.3d at 631-632, Pet. App. 129a-130a (Thacker, J., concurring in part); *id.*, 857 F.3d at 646-647, Pet. App. 162a-163a (Niemeyer, J. dissenting).

Given the likelihood that lower courts will use the "welcome restraint" analysis in future cases, the Court should take this opportunity to explicitly endorse robust protections for speech about elections and political campaigns.

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penalized. ... It can only result in a deterrence of speech which the Constitution makes free").

[8] Whether Section 2(c)'s temporary suspension of entry violates the Establishment Clause.

[9] Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017).

I. The Fourth Circuit's "Welcome Restraint" Analysis Conflicts With Numerous Settled Precedents.

Although this case concerns an Establishment Clause dispute, the Fourth Circuit majority quotation above poses important questions concerning free speech, content, and speakers. Yet, rather than maintain the courts' traditional respect for vigorous campaign speech,[10] the lower court here "welcome[d] restraint" on "campaign promises" of a particular type and by a particular speaker.[11] *IRAP*, 857 F.3d at 600; Pet. App. 62a.

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[10] *Republican Party of Minn. v. White*, 536 U.S. 765, 781 (2002) ("the notion that the special context of electioneering justifies an abridgment of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head") (emphasis omitted); *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) ("It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign") (internal citation and quotation marks omitted); *Eu v. San Francisco Cnty Dem. Cent. Comm.*, 489 U.S. 214, 223 (1989) ("[D]ebate on the qualifications of candidates" is "at the core of our electoral process and of the First Amendment freedoms") (citations and quotation marks omitted).

[11] The identity of the speaker was important in this case:

> "Indeed, the plaintiffs conceded during oral argument that if another candidate had won the presidential election in November 2016 and thereafter entered this same Executive Order, they would have had no problem with the Order. As counsel for the plaintiffs stated, "I think in that case [the Order] could be constitutional."

IRAP, 857 F.3d at 649, Pet. App. 167a-168a (Niemeyer, J., dissenting).

Elected officials have to campaign for office, leaving trails of campaign statements, promises, and speeches. Often, the campaign trail is littered with scorching controversies, including those over religion.[12] Absent rare and established exceptions,[13] the government—including its judicial department—may not discriminate among these messages, supporting some and discouraging others.

The Fourth Circuit chose to use the Establishment Clause's "purpose" requirement to impose its view of which campaign speech should be "restrained." That choice ignored this Court's clear statements concerning the level of protection given to campaign speech, and risks further harm to First Amendment interests as courts explore the range of campaign statements they may legitimately deter.

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[12] For example, the Fourth Circuit below cited *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), a case involving "the Ten Commandments Judge," Alabama Chief Justice Roy Moore. *IRAP*, 857 F.3d at 595, 599, Pet. App. 51a-52a, 60a. Moore is currently running for the Senate from Alabama. Ed Kilgore, "Alabama's 'Ten Commandments Judge' Is Running for Senate," New York, April 27, 2017, http://nymag.com/daily/intelligencer/2017/04/alabamas-ten-commandments-judge-is-running-for-senate.html.

[13] "These historic and traditional categories long familiar to the bar – including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct – are well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Stevens*, 559 U.S. at 468 (citations and quotation marks omitted). None of these categories is implicated here.

1. Campaign Speech is Highly-Protected, Even When It is Controversial, Offensive, or False.

When candidates speak, what they say during their campaigns is highly protected: "Indeed, as we have emphasized, the First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *McCutcheon*, 134 S. Ct. at 1441, (quoting *Monitor Patriot Co.*, 401 U.S. at 272).

Equally important,

> the degree to which speech is protected cannot turn on a legislative or judicial determination that particular speech is useful to the democratic process. The First Amendment does not contemplate such "ad hoc balancing of relative social costs and benefits." *Stevens*, 559 U.S. at 470; *see also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000) ("What the Constitution says is that" value judgments "are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority").

McCutcheon, 134 S. Ct. at 1449-1450.

"Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010); *Playboy Entertainment Group, Inc.*, 529 U.S. at 827 (striking down content-based restriction).

In this case, the two entwined concerns are speech about religion and speech about politics and candidates. The high degree to which those two areas of speech are protected is settled law:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields, the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Cantwell v. Conn., 310 U.S. 296, 310 (1940).

In short, "[t]he constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" *N. Y. Times*, 376 U.S. at 271 (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)).

Further, the First Amendment bars "restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United,* 558 U.S. at 340. The danger is not only governmental disfavor of particular speakers, but also the very real danger that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id.*

In fact, even where the candidates in question are judges, who must maintain the highest degree of impartiality, the candidates' speech is protected at the highest levels. *Republican Party of Minn.*, 536 U.S. at 776-777. Judges who had participated in formulating laws and even spoken out on them are

not automatically disqualified. *Laird v. Tatum*, 409 U.S. 824, 831 (1972) (Justice Black participated in deliberations over the Fair Labor Standards Act, even though he was one of its principal authors in the Senate).

On its face, then, the Fourth Circuit's analysis is in substantial tension with this Court's unambiguous protection of campaign speech and speakers, regardless of identity or message. But there is another danger as well: relying upon candidates' speech in adjudicating later official actions risks entangling campaign speech with government speech doctrines. *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017) (government speech not restricted by the First Amendment). "If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents." *Id.* at 1758. The same is true of a government seal of disapproval, such as an official statement, like a published judicial opinion, that a particular utterance is anti-religious "hate speech."

Yet, the Fourth Circuit's "welcome restraint" of campaign speech risks *sotto voce* triggering the government speech factors this Court cited in *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015) and *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). Two of the *Walker/Summum* factors are usually present in campaign speech: candidate speech has long been equated with an expectation of government action (especially where the candidate was successful), and

candidates are often closely identified in the public's mind with the State, especially since the State often circulates materials, such as voter education and ballot materials, with the candidates listed.

But there is a third *Walker/Summum* requirement for counting speech as government speech: whether the State exercises control over candidates' messages. *Matal*, 137 S. Ct. at 1760. If the "welcome restraint" analysis becomes more widespread, the question of whether candidates' speech is actually some attenuated form of government speech becomes much more confusing.

Candidates' speech is not currently considered government speech, subject to government control and review. Looking at it through that lens would raise a further difficulty: when would campaign speech qualify as official action? This Court has unanimously held that "[s]imply expressing support" for a policy, without more, does not qualify as an official act. *McDonnell v. United States*, 136 S. Ct. 2355, 2371 (2016). It would be exceedingly strange if a particular type of stated support—that contained in campaign statements, even by sitting government officials—could rise to the level of actionable official actions. *See id. at* 2368 ("[S]etting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an official act"). Yet a too-eager willingness to probe campaign speech in order to prove an Establishment Clause violation risks that result.[14]

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[14] Of course, here the Executive Order, and not any particular statement by candidate Trump, is the "official act" being evaluated. And this case does not raise the specter of criminal sanctions. Nevertheless, the distinction between

The Fourth Circuit's "welcome restraint" analysis sets up a clash between the Free Speech, Association, and Establishment Clauses of the First Amendment. This Court has not set a standard for reviewing candidate campaign statements as part of an Establishment Clause analysis, but in the context of false statements made by elected officials,[15] "this Court has rejected as 'startling and dangerous' a 'free-floating test for First Amendment coverage ... [based on] an ad hoc balancing of relative social costs and benefits.'" *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (quoting *Stevens*, 559 U.S. at 470) (brackets and ellipses in original). That cautionary note should be extended to the facts presented here.

2. Protection of Campaign Speech Offers More Information to Voters.

Uninhibited speech is not merely protected in the interest of the speaker. The "right to receive information and ideas, regardless of their social

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campaign speech and official action is necessarily blurred where the principal evidence for an official act's true meaning comes from public campaign statements and not from the act itself. Absent this Court's intervention, future litigation will doubtless further blur that line, especially in cases involving incumbent officeholders.

[15] *See, generally*, Richard Hasen, "A Constitutional Right to Lie in Campaigns and Elections?" 74 MONTANA L.REV. 53 (2013) http://scholarship.law.umt.edu/mlr/vol74/iss1/4; Margaret H. Zhang, "Note: *Susan B. Anthony List v. Driehaus* and the (Bleak) Future of Statutes That Ban False Statements In Political Campaigns," 164 U. PA. L. REV. ONLINE 19 (2015), www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-19.pdf.

worth, is fundamental to our free society." *Stanley v. Ga.*, 394 U.S. 557, 564 (1969) (internal citation omitted).

The Fourth Circuit's invitation to self-censorship, then, is self-defeating: if candidates intend to act contrary to the Constitution, including the Establishment Clause, they must "have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate [their] personal qualities and their positions on vital public issues" before voting. *Brown*, 456 U.S. at 53 (citation and quotation marks omitted). After all, it is not obvious that the cause of religious nondiscrimination is furthered by hiding candidates' views on relevant policies from scrutiny by the electorate.

3. The Use of Campaign Statements Was Not Necessary to the Resolution of This Case.

More than one judge below felt that the majority could have come to the same conclusion – "for more practical reasons" – without using candidate Trump's statements. *IRAP*, 857 F.3d at 631, Pet. App. 129a (Thacker, J., concurring).[16] Judge Thacker noted that candidate Trump's statements: "reveal religious animus that is deeply troubling. Nonetheless, I do not adhere to the view that we should magnify our analytical lens simply because doing so would support our conclusion, particularly

[16] Judge Thacker noted that courts "should...hesitate to attach constitutional significance to words a candidate offers on the campaign trail." *IRAP*, 857 F.3d at 631, Pet. App. 129a.

when we need not do so." 857 F.3d at 600, Pet. App. 130a (citation omitted).[17]

None of the cases relied upon by the Fourth Circuit majority opinion below found it necessary to look at candidates' campaign statements for Establishment Clause reviews. *IRAP*, 857 F.3d at 599, Pet. App. 59a-60a. That court relied on *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003) to show that other courts have looked at campaign statements in Establishment Clause cases. *IRAP*, 857 F.3d at 595, 599, Pet. App. 51a, 60a; *Int'l Refugee Assistance Project, et al. v. Trump, et al.*, 2017 U.S. Dist. LEXIS 37645 (D. Md. 2017) at *43, *47, Pet. App. 245a, 248a. But in *Glassroth*, the Eleventh Circuit did not need the campaign statements of Chief Justice Roy Moore to show his religious purpose in unilaterally erecting a Ten Commandments statue in the Alabama Judicial Building. The Eleventh Circuit found Chief Justice Moore's purpose in his statements while in office at the unveiling of the statue, and in his testimony at trial. *Glassroth*, 335 F.3d at 1286-87. The campaign statements were mentioned only in passing.[18]

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[17] The Ninth Circuit panel in No. 16-1540 did not address the Establishment Clause in its review. *Trump v. Hawaii*, 859 F.3d 741, 761 (9th Cir. 2017), slip op. at 15 ("we need not, and do not, reach the Establishment Clause claim to resolve this appeal."). Consequently, that Court did not adopt the Fourth Circuit's approach to proving a violation of that clause.

[18] Similarly, *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998), *IRAP*, 857 F.3d at 599, Pet. App. 59a n.20, did not involve either government officials or candidates for office. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 463 (1982), was an Equal Protection challenge. *Calif. v. United States*, 438 U.S. 645, 663-64 (1978), was a challenge to the Reclamation Act of 1902, and noted only that both major political

This suggests that the Fourth Circuit majority's "welcome restraint" analysis was not narrowly-tailored or the least-restrictive alternative for dealing with candidate Trump's "troubling" campaign statements. Indeed, there is no indication that campaign statements, as opposed to other statements made after the President took the oath of office and accepted his duties to the Constitution, added anything to the Fourth Circuit's analysis worth the threat of chill to campaign speech and consequent distortion of our national political debates.

The Court should act swiftly and decisively to quash the use of the counter-productive, unnecessary, and unwelcome "welcome restraint" analysis. The Court should again forcefully reject a test where judges must weigh the value of particular campaign speech, and candidates must self-censor their own speech to avoid later review. Otherwise, the "fullest and most urgent application" of the Free Speech Clause will be subordinated to another part of the First Amendment, and individual judges will be left with the inherently subjective task of balancing equally-important rights, a project that, in the absence of this Court's guidance, will inevitably lead to differing and unpredictable results.

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parties supported the Act and, *once he assumed office*, so did the successful Presidential candidate: "In his first message to Congress after assuming the Presidency, Theodore Roosevelt continued the cry for national funding of reclamation." 438 U.S. at 664; *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977) was another Equal Protection challenge, and addressed only official legislative or administrative histories.

II. The Broad Application of the Fourth Circuit's "Welcome Restraint" Analysis Cannot Be Limited and Its Use Will Expand.

The Fourth Circuit's opinion below opens with a bold declaration that the Executive Order under consideration in this case, "drips with religious intolerance, animus, and discrimination." *IRAP*, 857 F.3d at 572, Pet. App. 2a. Even if that were a legitimate basis for officially discouraging similar campaign speech – which, as shown above, it is not – today's supercharged and contentious political atmosphere almost guarantees that the Fourth Circuit's "welcome restraint" analysis will resurface unless this Court speaks strongly against it.

Having been announced by a federal court of appeals sitting *en banc*, the Fourth Circuit's invitation to self-censorship is certain to be influential.[19] Dicta or not, the concept of "welcome restraint" will be tempting authority for future litigants probing the intentions of elected officials, with "every repetition imbed[ing] that principle more deeply in our law and thinking and expand[ing] it to new purposes." *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

Free speech is under considerable pressure. Students at public universities demand, and sometimes receive, "safe spaces" where they do not have to listen to speech with which they disagree or

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[19] Indeed, a simple Google search already finds about 247,000 results containing the quote "drips with religious intolerance, animus, and discrimination."

which they feel is harassing.[20] Government officials claim that "hate speech" is not protected by the First Amendment.[21] In the private realm, Facebook is hiring thousands of employees to review posts to avoid "hate speech," however defined,[22] and GuideStar, a previously-neutral republisher of annual tax forms submitted by tax-exempt organizations, put banners on its site claiming that dozens of conservative and religious organizations

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[20] Cal. Educ. Code § 234.1(d)(2)(A) (schools may provide "safe spaces for LGBTQ and other at-risk youth"); Prof. Alan Levinowitz, "How Trigger Warnings Silence Religious Students," The Atlantic, Aug. 30, 2016, https://www.theatlantic.com/politics/archive/2016/08/silencing-religious-students-on-campus/497951/.

[21] Kristine Phillips, "The Fix: 'Hate speech is not protected by the First Amendment,' Portland mayor says. He's wrong," The Washington Post, May 30, 2017, https://www.washingtonpost.com/news/the-fix/wp/2017/05/30/hate-speech-is-not-protected-by-the-first-amendment-oregon-mayor-says-hes-wrong.

[22] Ingrid Lunden, "Facebook to add 3,000 to team reviewing posts with hate speech, crimes, and other harming posts," TechCrunch, May 3, 2017, https://techcrunch.com/2017/05/03/facebook-to-hire-3000-to-review-posts-with-hate-speech-crimes-and-other-harming-posts/ (added to 4,500 employees already conducting such reviews); Mark Zuckerberg, May 3, 2017, https://www.facebook.com/zuck/posts/10103695315624661 (same).

were "hate groups;"[23] GuideStar backed down[24] in the face of lawsuits, threats, and substantial criticism.[25]

Against this background, the Fourth Circuit majority below contends that its new "welcome restraint" analysis will not be a jurisprudential burden, or further undermine respect for free speech rights, because it is applicable only to a "**highly unique** set of circumstances." *IRAP*, 857 F.3d at 599, Pet. App. 61a (emphasis added). It contends: "The campaign statements here are probative of purpose because they are closely related in time, attributable to the primary decision maker, and specific and easily connected to the challenged action." 857 F.3d at 599, Pet. App. 59a-60a. Indeed, as noted *supra*, n. 11,

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[23] "GuideStar, website about charities, flags dozens of nonprofits as hate groups," CBS News, June 8, 2017, http://www.cbsnews.com/news/guidestar-charity-website-flags-nonprofits-hate-groups/.

[24] Michael Kunzelman, "Charity website cites threats in removing hate group labels," The Seattle Times, June 23, 2017, http://www.seattletimes.com/nation-world/charity-website-cites-threats-in-removing-hate-group-labels/.

[25] Andy Segedin, "GuideStar Sued For Using 'Hate Group' Designation," The Nonprofit Times, June 30, 2017, http://www.thenonprofittimes.com/news-articles/guidestar-sued-using-hate-group-designation/; Complaint, *Liberty Counsel v. GuideStar USA, Inc.* (E.D. Va. June 28, 2017) http://lc.org/062817GSComplaint.pdf.

In addition, the Evangelical Council for Financial Accountability sent a letter to GuideStar, available at http://www.ecfa.org/PDF/07-07-17%20GuideStar%20Letter.pdf, complaining about the "hate group label" and quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) ("Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.").

Respondents told the court below that the analysis would not have been applied to a candidate other than Trump. 857 F.3d at 649, Pet. App. 167a-168a (Niemeyer, J., dissenting).

Yet there is nothing "highly unique" in the circumstances identified by the majority opinion below that cabins the application of the "welcome restraint" doctrine just to Candidate and President Trump. A wide variety of candidates, from presidential to local specialty districts, make statements that some may find offensive to religious sensitivities.[26]

In tiny, rural San Juan County, Washington, for example, the San Juan County Public Hospital District #1 is a junior taxing district, administering, *inter alia*, a public subsidy to a local rural hospital.[27] The local hospital, Peace Island Medical Center, is a Catholic-affiliated institution.[28] In 2015, a slate of candidates, headed by Monica Harrington, successfully ran for the Hospital District Board.[29]

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[26] *See, e.g.*, the multiple suits including *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), involving the actions of Chief Justice Roy Moore – "the Ten Commandments Judge" case discussed in n. 12 *supra*; *N.Y. Times*, 376 U.S. at 271.

[27] www.sjcphd.org.

[28] PeaceHealth, About PeaceHealth, "Our Mission, Vision and Values," https://www.peacehealth.org/about-peacehealth/mission-values.

[29] "The Journal Endorses Sharp, Williams and Harrington For Hospital District Board," The Journal of the San Juan Islands, Oct. 20, 2015, http://www.sanjuanjournal.com/opinion/the-journal-endorses-sharp-williams-and-harrington-for-hospital-district-board-editorial/ ("We too sense that Harrington has a wider scope of issues with Catholic organizations than PeaceHealth, however

Harrington runs a website and blog called "Catholic Watch, Keeping Watch on Catholic Healthcare."[30] In 2017, Harrington and her colleagues on the Hospital District Board withdrew $50,000 of the public hospital subsidy and contracted with Planned Parenthood to provide services which they claimed were not offered by the Catholic-affiliated hospital.[31]

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her commitment to affordable healthcare and serving islanders comes first and foremost").

[30] www.catholicwatch.org. "CatholicWatch is committed to safeguarding patients, physicians, and taxpayers from the imposition of theocracy-based medicine."

Harrington herself has publicly made statements that could reasonably be considered "vilification of men who have been, or are, prominent in church," *N. Y. Times*, 376 U.S. at 271. Seattle Community Media, "Catholic HealthCare Your Only Choice," June 14, 2013, http://seattlecommunitymedia.org/series/moral-politics/episode/catholic-healthcare-your-only-choice, at 2:54 ("what it's about is increasing the span of control for the Catholic bishops and the health-care policies that they direct. ... It would be paranoid if it weren't for the fact that real women are paying the price with their lives and with their fertility.").

[31] Hayley Day, "Public Hospital District Votes to Contract with Planned Parenthood," The Journal of the San Juan Islands, May 31, 2017, http://www.sanjuanjournal.com/news/public-hospital-district-votes-to-contract-with-planned-parenthood/.

Recently the Hospital Board agreed to give $10,000 of the money removed from the hospital subsidy to other organizations and give Planned Parenthood only $40,000. Hayley Day, "EMS, Prevention Coalition to receive remaining hospital district funds," The Journal of the San Juan Islands, July 9, 2017, http://www.sanjuanjournal.com/news/ems-prevention-coalition-receive-one-time-subsidy-from-public-hospital-district/. Hospital Commissioner Monica Harrington dissented, arguing to use the remaining funds for "death with

These are the same circumstances that the majority below thought were "highly unique," though writ small. Even assuming that the Hospital District's Board votes were based on facially-neutral concerns, and the District's resolutions did not mention Catholic beliefs or Catholicism, under the Fourth Circuit's "welcome restraint" analysis, do the clear and relevant views in 2015 of candidates Harrington and her colleagues on the Board so taint the 2017 vote that the Planned Parenthood contract decision must be reviewed under the Establishment Clause? Given the contention over this small taxing district's actions, would the Washington or federal courts have to judge Harrington's motives based on her blogging and campaign statements? By what standards would those courts decide these cases? [32]

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dignity" services not available at the local Catholic-affiliated hospital. *Id.*

[32] As Judge Kozinski wrote in dissent in *State of Washington v. Trump*, 858 F.3d 1168, 1173-1174 (9th Cir. 2017):

> [Review of candidate statements] will mire us in a swamp of unworkable litigation. Eager research assistants can discover much in the archives, and those findings will be dumped on us with no sense of how to weigh them. Does a Meet the Press interview cancel out an appearance on Face the Nation? Does a year-old presidential proclamation equal three recent statements from the cabinet? What is the appropriate place of an overzealous senior thesis or a poorly selected yearbook quote?
>
> Weighing these imponderables is precisely the kind of "judicial psychoanalysis" that the Supreme Court has told us to avoid. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862 (2005). ...Limiting the evidentiary universe to activities undertaken while crafting an official policy makes for a manageable, sensible inquiry.

As this Court noted in *Meek v. Pittenger*, 421 U.S. 349 (1975), the possibility of repeated, diverse challenges to such offensive statements may itself generate Establishment Clause problems.[33] It is not difficult to envision similar concerns arising from complex and difficult judicial analyses.

Under a "welcome restraint" analysis, the potential for litigation premised upon campaign speech, and divergent interpretations of various phrases in different courts and before different judges, is enormous. This is not an analysis that can be limited to presidential candidates and executive orders; the Fourth Circuit's treatment of campaign speech will inevitably be applied to Establishment Clause cases arising from the full range of political disputes.

III. The Court Should Strongly Reject the "Welcome Restraint" Analysis Even If the Lower Court Opinion Is Vacated or Reversed On Other Grounds.

It is highly likely that the Court could resolve this matter without addressing the Fourth Circuit's

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But the panel has approved open season on anything a politician or his staff may have said, so long as a lawyer can argue with a straight face that it signals an unsavory motive.

[33] "This potential for political entanglement, together with the administrative entanglement which would be necessary to ensure that auxiliary-services personnel remain strictly neutral and nonideological when functioning in church-related schools, compels the conclusion that Act 194 violates the constitutional prohibition against laws 'respecting an establishment of religion.'" *Pittenger*, 421 U.S. at 372.

"welcome restraint" analysis or its probable effects. For example, Petitioners suggested to the Court by letter on June 25, 2017, that this case was moot because the only individual plaintiff in the underlying case has received her visa.[34] Petitioners argued that this visa should warrant "reversal or vacatur of the ruling below."[35] Media reports also suggest that the review of national security procedures required by the Executive Order may be completed before this case can be heard.[36] Indeed, the Court's June 26th Order granting the Petition and consolidating the cases directed the parties to address "[w]hether the challenges to 2(c) became moot on June 14, 2017." *Trump et al. v. Int'l Refugee Assistance Project, et al*, 582 U.S. ___ (2017), slip op. at 9.

The "established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Vacatur would "clear[] the path for future relitigation of the issues between the parties and eliminate a judgment, review of which was prevented through happenstance." 340 U.S. at 40.

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[34] Letter to Hon. Scott S. Harris, Clerk, from Jeffrey B. Wall, Acting Solicitor General, June 25, 2017, p. 2.

[35] *Ibid.*

[36] Andy J. Semotiak, "Supreme Court Hands Border Agents Potentially Confusing Task In Partially Lifting Freeze on Travel Ban," Forbes, June 27, 2017, https://www.forbes.com/sites/andyjsemotiuk/2017/06/27/supreme-court-supports-part-of-presidents-travel-ban.

Reversal or vacatur, however, is not always required under *Munsingwear*. The mootness of this case would not be caused by either the "unilateral action of the party who prevailed below" or the "vagaries of circumstance." *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994).

Even if the Court addresses the merits of the Fourth Circuit opinion, it may not also reach the "welcome restraint" analysis for a variety of reasons. Given the likelihood of further use of the Fourth Circuit's analysis by future litigants or reviewing courts, as shown *supra*, it is important for the Court to reaffirm its firm commitment to the free speech of candidates, as also shown *supra*.

The Court should use this opportunity to forestall further use of the Fourth Circuit's imposition of a "welcome restraint" on particular speech and speakers by clearly stating that such "restraint" is neither a proper function of the judicial branch, nor an appropriate remedy for speech, regardless of how offensive or false.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that, no matter how else this Court rules on these cases, the Court should expressly reject the "welcome restraint" analysis used by the Fourth Circuit below.

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